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COURT OF CRIMINAL APPEALS
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No. PD-0003-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/16/2020
DEANA WILLIAMSON, CLERK

KYLE DEAN KUYKENDALL, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Kerr County

* * * * *

STATE'S BRIEF ON THE MERITS

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Kyle Dean Kuykendall.

*The case was tried before the Honorable M. Rex Emerson, Presiding Judge, 198th District Court, Kerr County, Texas.

*Counsel for Appellant in the trial court was Lucy Pearson, 215 Earl Garrett, Suite 3, Kerrville, Texas 78028.

*Counsel for Appellant on appeal is M. Patrick Maguire, 945 Barnett Street, Kerrville, Texas 78028.

*Counsel for the State at trial were Scott F. Monroe, 198th District Attorney, and Stephen B. Harpold, 198th Assistant District Attorney, 402 Clearwater Paseo, Suite 500, Kerrville, Texas 78028.

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No. PD-0003-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

KYLE DEAN KUYKENDALL, Appellant

v.

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A promise to appear in court when notified as a condition of release should be honored. The Legislature provides a criminal penalty for breaking that promise. It should apply to every promise broken.

STATEMENT OF THE CASE

Appellant was released on two bonds for two counts of credit/debit card abuse. He failed to appear at a single hearing on both counts, and was charged with, pleaded guilty to, convicted of, and punished for two counts of failure to appear (FTA). The court of appeals held that multiple punishments violate the Double Jeopardy Clause.[1]

[1] *Kuykendall v. State*, 592 S.W.3d 967, 972, 974 (Tex. App.—Houston [1st Dist.] 2019, pet. granted).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not requested.

ISSUE PRESENTED

What is the unit of prosecution for failure to appear, TEX. PENAL CODE § 38.10?

STATEMENT OF FACTS

In April of 2012, appellant was charged with two counts of credit/debit card abuse and released on separate surety bonds of $15,000 each.[2] In September of 2015, appellant obtained two bonds in the same amount with a different surety.[3] Both versions of both bonds specified that appellant would appear before the District Court upon notice.[4] On November 13, 2015, appellant was sent a notice to appear at a revocation hearing on the 30th of that month on both counts.[5] He failed to appear.[6] He was indicted on two counts of failure to appear.[7] Appellant pleaded guilty to both, was found guilty, and was sentenced to 10 years on each.[8]

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[2] Supp 3 CR 10-12 (Count 1), 4-6 (Count 2).

[3] Supp 3 CR 17 (Count 1), 19 (Count 2); Supp 4 CR 8, 14 (Count 1), 10, 16 (Count 2). Much of the relevant material is repeatedly included in multiple supplemental clerk's records.

[4] Supp 3 CR 5, 11, 17, 19.

[5] Supp 3 CR 21; Supp 4 CR 18.

[6] Supp 3 CR 22.

[7] CR 6-7.

[8] 2 RR 11-12; 3 RR 23; CR 21 (Count 1), 24 (Count 2).

SUMMARY OF THE ARGUMENT

"Failure to appear" is a "circumstances of conduct" offense that focuses on the terms of release rather than the general duty to appear. This evinces a legislative intent to punish bail-jumpers for each agreement broken rather than each hearing skipped. Review of the underlying policy and practice of most other jurisdictions that have addressed the issue confirms the wisdom of this interpretation.

ARGUMENT

I. "Multiple punishments" is about legislative intent.

The Double Jeopardy Clause of the Fifth Amendment prohibits, among other things, multiple punishments for the same offense.[9] In a practical sense, however, there are few constitutional limitations on multiple punishments because legislatures have the power to establish and define crimes.[10] In this context, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[11] Thus, the true inquiry in a multiple-punishments case is whether the Legislature intended to authorize them.[12]

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[9] *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014).

[10] *Id*.

[11] *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

[12] *Garfias*, 424 S.W.3d at 58.

When a defendant is charged with multiple violations of a single statute, legislative intent is determined by the allowable unit of prosecution.[13] The Legislature's collective intent is best determined by reading the statute[14] with a focus on grammar and syntax[15] and the presumption that the entirety should be given effect if reasonably possible.[16] The allowable unit of prosecution flows from the statute's construction and ascertaining the gravamen, or gist, of the offense.[17] Only when absurdity would result, or when reasonably well-informed people may understand the text differently, may extra-textual sources be considered.[18]

The gravamen of an offense typically falls into one of three general types: "result of conduct," "nature of conduct," and "circumstances of conduct."[19] Each "conduct element"—there can be more than one—that "form[s] the overall behavior which the Legislature has intended to criminalize" requires a culpable mental state.[20]

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[13] *Stevenson v. State*, 499 S.W.3d 842, 850 (Tex. Crim. App. 2016); *Ex parte Hawkins*, 6 S.W.3d 554, 557 (Tex. Crim. App. 1999).

[14] *O'Brien v. State*, 544 S.W.3d 376, 384 (Tex. Crim. App. 2018).

[15] *Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013).

[16] *O'Brien*, 544 S.W.3d at 384. *See* TEX. GOV'T CODE § 311.021(2) ("In enacting a statute, it is presumed that: . . . (2) the entire statute is intended to be effective[.]").

[17] *Stevenson*, 499 S.W.3d at 850; *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015).

[18] *O'Brien*, 544 S.W.3d at 384.

[19] *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011). *See* TEX. PENAL CODE § 6.03 (describing application of mental states to these "conduct elements").

[20] *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989).

"Result of conduct" offenses concern the product of certain conduct regardless of the specific manner of causation.[21] For "nature of conduct" offenses, "it is the act or conduct that is punished, regardless of any result that might occur."[22] "'[C]ircumstances of conduct' offenses prohibit otherwise innocent behavior that becomes criminal only under specific circumstances."[23]

When an offense is of the "circumstances of conduct" variety, three related things happen: a mental state must be attached to the surrounding circumstance,[24] the circumstance is the gravamen of the offense,[25] and unanimity about the existence of the circumstance is required.[26] Thus, the easiest way to tell if a statute is a "surrounding circumstances" offense is if requiring a jury finding on knowledge (or a criminal degree of disregard or ignorance) of that circumstance is the only way to

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[21] *Young*, 341 S.W.3d at 423.

[22] *Id*.

[23] *Id*. *See* TEX. PENAL CODE § 6.01(c) ("A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.").

[24] *McQueen*, 781 S.W.2d at 603.

[25] *Young*, 341 S.W.3d at 424; *Huffman v. State*, 267 S.W.3d 902, 908 (Tex. Crim. App. 2008) ("When a culpable mental state is required to attach to a particular circumstance, it is because that circumstance is the gravamen of the offense.").

[26] *O'Brien*, 544 S.W.3d at 383 ("And if the gravamen of the crime is a 'circumstances surrounding the conduct,' unanimity is required about the existence of the particular circumstance of the offense."); *Young*, 341 S.W.3d at 424.

fairly impose criminal liability.[27]

II. The Legislature intended to punish each violation of an agreement to appear.

A. FTA is a "circumstances of conduct" offense.

This Court has not squarely addressed the elements and, thus, gravamen of FTA. Review of the statute's plain language and structure shows that, like theft and unlawful use of a motor vehicle (UUMV), FTA is a "circumstances of conduct" offense.

"A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release."[28] Although not an explicit element, courts require that the defendant[29] have notice of the hearing before his failure to appear can be intentional or knowing.[30] And this Court has indicated that lack of notice is a distinct argument from the "reasonable excuse" defense provided

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[27] *See Goss v. State*, 582 S.W.2d 782, 785 (Tex. Crim. App. 1979) ("A construction of [the "failure to stop and render aid" statute] that imposes strict liability upon the driver who had no knowledge that an accident had occurred would be unreasonable, and we find such a construction untenable.").

[28] TEX. PENAL CODE § 38.10(a).

[29] "Defendant" will be used with the understanding that not all people released have been formally charged.

[30] The first explicit statement of this requirement appears to be in *Richardson v. State*, 699 S.W.2d 235, 238 (Tex. App.—Austin 1985, pet. ref'd) (per curiam) (op. on reh'g).

by statute.[31] That makes sense; once it is accepted that notice must be required, forcing a defendant to raise it as a defense is redundant and unfair.[32] Instead, "reasonable excuse" permits more diverse claims.[33]

So what is the gist of FTA? Syntactically, it is not clear whether the mental state of "intentionally or knowingly" applies to everything that follows it or just to the failure itself. But it is clear that the failure to appear in a court is not criminal

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[31] *Euziere v. State*, 648 S.W.2d 700, 702 (Tex. Crim. App. 1983) ("Since appellant had notice of the setting and since appellant asserts 'no reasonable excuse' for his failure to appear, ..."). *See* TEX. PENAL CODE § 38.10(c) ("It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release."). It is also a defense that "the appearance was incident to community supervision, parole, or an intermittent sentence." TEX. PENAL CODE § 38.10(b). This defense appears intended to narrow FTA's applicability so that it does not interfere with what are administrative matters that generally do not involve a defendant's physical presence at an official court proceeding, *e.g.*, regular meetings with probation officers. *Timmins v. State*, 560 S.W.3d 671, 678 (Tex. App.—San Antonio 2018, pet. granted on other ground, PD-0867-18).

[32] Nevertheless, some courts of appeals have conflated the two. *See*, *e.g.*, *Solomon v. State*, 999 S.W.2d 35, 38 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("However, as we concluded in our discussion above, appellant failed to demonstrate he received no notice of the settings, and therefore, was not entitled to a defensive charge on the issue."); *Barrera v. State*, 978 S.W.2d 665, 671 (Tex. App.—Corpus Christi 1998, pet. ref'd) ("We hold that appellant's acknowledgment of the notice of the trial setting was sufficient to establish that his failure to appear was done intentionally or knowingly and without a reasonable excuse.").

[33] *See*, *e.g.*, *Bailey v. State*, 507 S.W.3d 740, 749 (Tex. Crim. App. 2016) (defendant believed revocation of her bond for a different reason had cancelled the setting she failed to appear at); *Barrera*, 978 S.W.2d at 671 (defendant said counsel told him the charges would likely be dismissed or the trial reset); *Gallegos v. State*, 828 S.W.2d 577, 579 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (advice of counsel); *Patterson v. State*, No. 11-17-00010-CR, 2019 WL 238059, at *1 (Tex. App.—Eastland Jan. 17, 2019, pet. ref'd) (not designated for publication) (defendant got a flat tire and was told by someone he believed to be his lawyer's secretary that the arraignment hearing would be rescheduled); *Garcia v. State*, No. 13-17-00079-CR, 2018 WL 2057416, at *2 (Tex. App.—Corpus Christi May 3, 2018, no pet.) (not designated for publication) (court settings in two counties on the same day); *Fininen v. State*, No. 06-16-00039-CR, 2016 WL 6277430, at *2 (Tex. App.—Texarkana Oct. 27, 2016, no pet.) (not designated for publication) (drove himself to ER that morning).

unless there is some circumstance that creates a duty to do so. In this case, that duty is one of the terms of the defendant's release. A defendant cannot be guilty unless he is aware of that circumstance. "Failure to appear" is thus a "circumstances of conduct" offense.

This result is consistent with this Court's treatment of the similarly worded UUMV statute. "A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."[34] In *McQueen*, this Court concluded that its prior holding that mistake of fact applies to the "consent" element of that offense necessarily means that a culpable mental state attaches to the lack of consent.[35] The Court went further, explaining that this must be the case because 1) "operation" is not inherently unlawful, 2) no result of operation is required, and 3) what makes the conduct unlawful is that lack of permission.[36] This unavoidable reality overcame the "confusion" caused by the fact that the mental state of UUMV "does not syntactically modify the circumstances surrounding the conduct but instead precedes the act of

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[34] TEX. PENAL CODE § 31.07(a).

[35] 781 S.W.2d at 603. *See* TEX. PENAL CODE § 8.02(a) ("It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.").

[36] *Id*.

operating a vehicle."[37] This was simply another application of the reasoning it applied to the theft statute to make its elements reflect what makes the actor's conduct unlawful.[38]

The courts of appeals that have categorized the conduct element of FTA agree that it is a "result of conduct" offense because "the crime is defined in terms of one's objective to produce a specific result,"[39] but that's not "a comfortable fit."[40] Despite the fact that these cases were all decided after *Huffman* put the spotlight on "circumstances of conduct" offenses, they fail to account for the requirement that the failure is not unlawful unless there is a duty and, thus, awareness of that duty.

B. The important circumstance is the agreement, not the duty.

Unfortunately, this conclusion does not fully answer the question presented. That is, basing liability on a surrounding circumstance does not, on its own, signal the intent to permit multiple punishments for failing to appear at a single hearing as required by multiple bonds. But the specificity of the statute does because it focuses on the terms of the agreement authorizing release.

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[37] *Id*. at 603-04.

[38] *Id*. at 604 ("Accordingly, just as we held in *McClain* [*v. State*, 687 S.W.2d 350 (Tex. Crim. App. 1985)] with regard to Sec. 31.01, we believe Sec. 6.03(b) requires proof of the actor's knowledge of this circumstance.").

[39] *Walker v. State*, 291 S.W.3d 114, 117 (Tex. App.—Texarkana 2009, no pet.); *Figueredo v. State*, 572 S.W.3d 738, 744 (Tex. App.—Amarillo 2019, no pet.) (quoting *Walker*); *Garcia*, 2018 WL 2057416, at *2 (citing *Walker*).

[40] *O'Brien*, 544 S.W.3d at 389.

Again, "A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release."[41] Whatever else "the terms of release" entail, they necessarily include "the condition that he subsequently appear." The "condition" language would be redundant unless "the terms of release" has independent significance. As one court of appeals put it, "by statutory definition, the offense necessarily incorporates, as an element of the offense, the terms of the accused's release."[42] It must be presumed that the Legislature intended it to mean something. But what?

It could be that, in a given case, the terms of release include conditions or details other than the requirement to subsequently appear that are relevant to prosecution—the court, the county, etc. However, this interpretation has no application when the bond, like appellant's original bonds, does not specify at which of the county's district courts he must appear upon notification.[43] Regardless, there is a more obvious reason for treating "the terms of . . . release" separately from the "condition that he . . . appear": the defendant had an agreement with the court.

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[41] TEX. PENAL CODE § 38.10(a).

[42] *Figueredo*, 572 S.W.3d at 743.

[43] Supp 3 CR 10-12 (Count 1), 4-6 (Count 2). The Magistrate's Warnings did specify the court. Supp 3 CR 6, 12.

When a defendant is released, it is because he has agreed with the court to do certain things. His most basic promise is that he will appear when notified. A defendant effectively executes a separate promise on each case or count.[44] This is so with multiple bonds issued on different days on different cases, multiple bonds issued the same day on multiple cases, and a single bond issued on multiple cases. Regardless of how many cases are covered by a bond, the terms are that he appear in each case whenever notified. This must be so because they can be called separately, and because no case can proceed without the defendant's appearance. So, regardless of the bond-to-case ratio, a defendant's failure to appear on multiple cases at a single hearing violates multiple terms of his release and prevents the administration of justice in multiple cases. That is worthy of multiple punishments.[45]

The alternative, as Judge Richardson pointed out in his concurrence to *Ex parte Marascio*, is to base the multiple-punishments analysis on scheduling decisions that are largely the domain of administrative staff.[46] This makes no sense. It is one thing for the State to recognize a trade-off and accept the consequences, as when it chooses

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[44] "Case" and "count" will be used interchangeably to denote discrete charged offense.

[45] A policy argument could be made that multiple-bond cases are more worthy of attention because the failure to appear risks multiple forfeitures, potentially diminishing the willingness of people to become sureties. However, nothing about the phrase "terms of his release" lends itself to distinctions based on the form the multiple (broken) promises took.

[46] 471 S.W.3d 832, 848-49 (Tex. Crim. App. 2015) (Richardson, J., concurring).

to join certain prosecutions at the "cost" of concurrent sentencing.[47] In that case, the Legislature has explicitly set the rules. It is another for the trial court, unwittingly, knowingly, or at the request of either party, to set the unit of prosecution by scheduling (or not scheduling) hearings minutes apart from each other. Legislative intent should not be ignored, and certainly not so easily or even unintentionally.

III. An overview of extra-jurisdictional FTA cases shows a consensus favoring multiple punishments.

Although not necessary, examination of the relatively few jurisdictions that have considered this issue shows that this interpretation makes sense.[48] There are three basic types of bail-jumping/bond-jumping/failure-to-appear statutes. Those jurisdictions that have interpreted statutes similar to ours permit multiple punishments. And both of the other types have been interpreted by some court to support multiple punishments. They largely agree on the rationale.

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[47] *See* TEX. PENAL CODE § 3.03(a) ("When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.").

[48] Judge Richardson mentioned most of the cases in his concurrence to the *per curiam* denial of relief in *Ex parte Marascio*. 471 S.W.3d at 849 n.51 (Richardson, J., concurring).

A. "Terms of release" statutes make each violation of a contract for release an offense.

The first type is, like ours, the "terms of release" statute. Wisconsin and Connecticut have similar statutes.[49] They both permit multiple punishments for the failure to appear at a single hearing, for multiple reasons.

The most basic reason is that the offenses are, in fact, separate. The Supreme Court of Wisconsin applied a "multiplicity" analysis comparable to our "*Blockburger* plus" framework[50] and determined that "[e]ach count would require proof of facts for conviction which the other two counts would not require because each bond would give rise to an individual factual inquiry."[51] The court found no indication from the plain language of the statute that its legislature intended to limit the allowable unit of prosecution: "To import into the bail jumping statute that a defendant can only be

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[49] WIS. STAT. ANN. § 946.49(1) ("Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond . . . ."); CONN. GEN. STAT. ANN. § 53a-172 (a) ("A person is guilty of failure to appear in the first degree when (1) while charged with the commission of a felony and while out on bail or released under other procedure of law, such person wilfully fails to appear when legally called according to the terms of such person's bail bond or promise to appear . . . .").

[50] Wisconsin asks "(1) Whether the offenses are identical in the law and in fact, and (2) the legislative intent as to the allowable unit of prosecution under the statute in question." *State v. Richter*, 525 N.W.2d 168, 169 (Wis. 1994). This second step considers "1) statutory language; 2) legislative history and context; 3) the nature of the proscribed conduct; and 4) the appropriateness of multiple punishment." *State v. Anderson*, 580 N.W.2d 329, 335 (Wis. 1998), holding modified by *State v. Davison*, 666 N.W.2d 1 (Wis. 2003). *Compare Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999) (listing additional factors that can be used to ascertain legislative intent for multiple punishments). One notable difference is that Wisconsin has a rebuttable presumption either way the first question is answered. *Anderson*, 580 N.W.2d at 335.

[51] *Richter*, 525 N.W.2d at 169-70.

charged with one offense even if the act violates separate bonds would be not to construe, but to rewrite the statute."[52] This reasoning, initially applied to multiple-bond cases, was later applied by Wisconsin's lone court of appeals to a defendant charged in multiple cases but released on a single bond.[53]

The second reason is that the "terms of release" is a contract. When there are multiple bonds, each is a separate contract "constitut[ing] an independent promise to appear."[54]

The third reason is that adherence to the language of the statute best effectuates its purpose. The Wisconsin Court of Appeals concluded its multiplicity analysis by noting that failing to appear once still "result[s] in two separate wrongs, preventing the [trial] court from proceeding with preliminary hearings in two separate cases."[55] The Supreme Court of Connecticut further detailed the policy implications of a contrary interpretation in its multiple-bond case. First, it would make the number of permissible prosecutions "hinge[] on whether hearings on his two separate files were

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[52] *Id*. at 170. On a more complete Step 2 analysis in *Anderson*, that court found no indication the legislature intended to prohibit multiple punishments, at least those that arose out of violation of multiple conditions of a single bond. *Anderson*, 580 N.W.2d at 335-36.

[53] *State v. Eaglefeathers*, 762 N.W.2d 690, 692, 695 (Wis. Ct. App. 2008) (calling the number of bonds "a red herring").

[54] *State v. Garvin*, 699 A.2d 921, 925-26 (Conn. 1997). The Supreme Court of Connecticut explicitly ignored the argument that each charge included an element the other did not. *Id*. at 924.

[55] *Eaglefeathers*, 762 N.W.2d at 696.

scheduled together or apart[,]" *i.e.*, a "matter of administrative convenience."[56] This "would exalt the consequences of scheduling practice over the [statute's] underlying purpose . . . , which is the protection of the integrity of the bail bond system."[57] Second, that construction would reduce the offense to a sanction for contempt of court—something a court has inherent power to do "to preserve its dignity and protect its proceedings"—"rather than a sanction to deter the violation of bail bonds" as intended by its legislature.[58]

B. "As required" jurisdictions are split.

The second type is the "as required" statute. Florida's statute is typical: "Whoever, having been released pursuant to chapter 903, willfully fails to appear before any court or judicial officer as required shall . . . ."[59] These statutes do not refer to any agreement. These jurisdictions are split on the unit of prosecution.

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[56] *Garvin*, 699 A.2d at 926. This is what Judge Richardson referred in *Marascio*. 471 S.W.3d at 849 (Richardson, J., concurring).

[57] *Garvin*, 699 A.2d at 926.

[58] *Id*.

[59] FLA. STAT. ANN. § 843.15(1). *See also* D.C. CODE ANN. § 23-1327(a) ("Whoever, having been released under this title prior to the commencement of his sentence, willfully fails to appear before any court or judicial officer as required, shall . . . ."); VA. CODE ANN. § 19.2-128(B) ("Any person (i) charged with a felony offense or (ii) convicted of a felony offense and execution of sentence is suspended pursuant to § 19.2-319 who willfully fails to appear before any court as required shall be guilty of a Class 6 felony."); WASH. REV. CODE ANN. § 9A.76.170(1) ("Any person having been released by court order or admitted to bail . . . and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.").

As Florida and the District of Columbia see it, the gravamen of such a statute is the failure to appear at a specified time and place, making failure to appear on multiple bonds a single unit of prosecution.[60] The D.C. court explicitly distinguished "terms of release" statutes: "More significantly, the statute under which [Lennon] was convicted specifically proscribes failing to appear in court as required, whereas the statutes in *Albarran* [discussed below] and *Richter* [the Wisconsin case discussed above] proscribed violating the terms of a bond agreement."[61]

A court of appeals in Washington came to the same conclusion but only by finding the statute susceptible to two reasonable interpretations on this point and applying the rule of lenity.[62]

Virginia is the outlier with regard to "as required" jurisdictions. Its Supreme Court determined that the plain language indicates that each underlying felony charge

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[60] *McGee v. State*, 438 So. 2d 127, 131 (Fla. Dist. Ct. App. 1983); *Hilton v. State*, 832 So. 2d 923, 924 (Fla. Dist. Ct. App. 2002) (citing *McGee*); *Lennon v. United States*, 736 A.2d 208, 210-11 (D.C. 1999). *Lennon* also contains language conditioning the holding on the single instrument. *Id.* at 212 ("We agree with the court in *McGee* that a defendant who is released on a single notice to appear and fails to appear for a single hearing may be convicted of only one count of failure to appear.").

[61] *Lennon*, 736 A.2d at 211. Interestingly, *Richter* distinguished *McGee* on the same basis. *Richter*, 525 N.W.2d at 170 (noting that Florida's statute "never mentions compliance with a bond").

[62] *State v. O'Brien*, 267 P.3d 422, 425 (Wash. 2011) ("[T]he statute provides no guidance about the unit of prosecution where, as here, a person fails to surrender after one court released him under multiple orders entered in different cases, each one requiring him to surrender on the same day and at the same time.").

is the unit of prosecution because it applies to a person charged with "a" felony.[63] But its reasoning went much deeper, mirroring the rationale of the "terms of release" jurisdictions:

> The symmetry of permitting a failure to appear charge for each underlying felony makes sense. . . . A person is in violation of Code § 19.2–128 when he "willfully fails to appear before any court *as required*." (emphasis added). . . . [J]ust as each summons has a separate existence with separate consequences and effects, each felony charge also has separate consequences and effects. A defendant's willful failure to appear prevents the Commonwealth from proceeding on each of the separate felonies and it prevents the court from adjudicating each charge. Justice (whether conviction or acquittal) is thus delayed or denied as to each specific felony. . . . The fact that Johnson's three separate felonies were scheduled to be heard at one time for the efficient administration of justice does not change the result. The net effect of his willful failure to appear were three distinct injuries to the administration of justice, even if these injuries occurred at the same time.[64]

Although not addressed by its Supreme Court, Virginia's lone intermediate court's opinion in that case reflected Wisconsin's reasoning when it held that, as a matter of fact and law, the failures are distinct offenses because the Commonwealth was required to prove notice and the felony nature of each offense individually.[65]

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[63] *Johnson v. Commonwealth*, 793 S.E.2d 321, 323 (Va. 2016).

[64] *Id*.

[65] *Johnson v. Commonwealth*, No. 1138-14-2, 2015 WL 4078146, at *5 (Va. Ct. App. July 7, 2015). It also rejected Johnson's invocation of the rule of lenity. *Id*. at *4 ("We cannot create ambiguity by straining to interpret a statute whose understanding requires no such exertion.").

C. "Fails to surrender" jurisdictions are split.

The third type is the "fails to surrender" statute. Illinois's appears typical: "Whoever, having been admitted to bail for appearance before any court of this State, incurs a forfeiture of the bail and knowingly fails to surrender himself or herself within 30 days following the date of the forfeiture, commits . . . ."[66] Courts are split on the unit of prosecution.

Oklahoma's Court of Criminal Appeals applied its statutory and case law for multiple punishments "arising from the same conduct" and held that missing a single court appearance after bonding out on six felony counts in two separate cases did not create six "separate and distinct" offenses.[67] The court would have entertained two violations—one for each cause number—but it was satisfied they "were being docketed and treated as one for the purpose of court appearances."[68] It also focused on the defendant's intent, as it saw it.[69]

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[66] 720 ILL. COMP. STAT. ANN. 5/32-10(a). *See also* 22 OKLA. STAT. ANN. § 1110 ("Whoever, having been admitted to bail or released on recognizance, bond, or undertaking for appearance before any magistrate or court of the State of Oklahoma, incurs a forfeiture of the bail or violates such undertaking or recognizance and willfully fails to surrender himself within five (5) days following the date of such forfeiture shall . . . .").

[67] *Bristow v. State*, 905 P.2d 815, 816-17 (Okla. 1995).

[68] *Id*. at 817.

[69] *Id*. ("All the offenses are clearly incident to Bristow's single objective of failing to appear for one court date.").

An Illinois appellate court came to the opposite conclusion on an equally short analysis of comparable facts: "[D]efendant was charged in two separate complaints with two separate offenses. He was admitted to bail in connection with each of these complaints, and he failed to appear on both. Accordingly, we hold that defendant properly was convicted with two counts of bail jumping."[70]

IV. Conclusion

Based on the structure of the statute, the Legislature intended to punish the failure to appear only under certain circumstances. Based on the language of the statute, that circumstance is the violation of a term of the agreement or agreements authorizing release. Each violation should give rise to an offense because each term is worthy of enforcement. Judges deserve it, sureties deserve it, and the system as a whole deserves it.

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[70] *People v. Albarran*, 352 N.E.2d 379, 382 (1976). Albarran was charged under an older but materially similar version of the statute cited above.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm both of appellant's convictions and sentences.

Respectfully submitted,

/s/ John R. Messinger

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 5,027 words.

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CERTIFICATE OF SERVICE

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